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No. 82-26

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1982

THE FIRST STATE BANK OF MIAMI,

Petitioner

v.

GOTHAM PROVISION COMPANY, INC.,
et al.

Respondents.

RESPONDENTS LYKES BROTHERS, INC., UNITED STATES SUGAR CORPORATION AND D. R. KILPATRICK BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Whether the three courts below erred in holding that the Respondents did not sell their livestock to a packer under "express" credit agreements, within the meaning of §196 of the Packers and Stockyards Act of 1921 and the regulations of the U.S. Department of Agriculture?

2. Whether the findings of fact by the Bankruptcy Judge, which the District Court and the Court of Appeals have upheld, are "clearly erroneous"?

3. Whether unsubstantiated predictions that the statute will have undesirable economic effects are an appropriate basis for certiorari?

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LIST OF SUBSIDIARY AND AFFILIATED COMPANIES

Lykes Brothers, Inc.
Tampa, Florida

Subsidiaries

1. Hillsboro Building, Inc.	Tampa, Florida
2. Lykes Brothers Insurance Agency	Tampa, Florida
3. Lykes Pasco Packing Co.	Dade City, Florida
4. M & M Supply Company of Florida, Inc.	Thonotosassa, Florida

United States Sugar Corporation
Clewiston, Florida

Subsidiaries

None

COUNTERSTATEMENT OF THE CASE

The Gotham Provision Company, Inc., a federally-regulated meat packer, went bankrupt in March of 1979.[1/] The dispute arose between The First State Bank of Miami and certain of the cattle producers over their respective rights to some of Gotham's accounts receivable under the 1976 amendments to the Packers and Stockyards Act of 1921, 7 U.S.C. §181, et seq. The producers included the Respondents in this matter, Lykes Brothers, Inc., United States Sugar Corporation, Rogers Farm, Inc., D.R. Kilpatrick, W.D. Roberts, Ronnie Perkins and Robbie Addison.

1/ Therefore this dispute arose in a case under the Bankruptcy Act of 1898, as amended, and not under the Bankruptcy Reform Act of 1978.

The cattle producers contended that under the statute the receivables were assets to be held in trust for cattle sellers. The bank argued that Gotham often had been late in paying the Respondents and that this made the latter "credit" sellers and, therefore, not entitled to the protection of the Act.

The Bankruptcy Court found that the facts did not support the bank's arguments and those findings (as to these Respondents) were upheld by the District Court and the Court of Appeals.

(a) The statute and its background

Between 1958 and 1975, 167 packers went bankrupt, leaving producers unpaid for $43,000,000 in livestock. Senate Rept. No. 94-932, 94th Cong., 2d Sess., at 5, reprinted in [1976] U.S. Code

Cong. & Admin. News 2267 (hereinafter Senate Rept.).

In 1974, the United States Supreme Court reversed a holding of the Fifth Circuit giving cattle producers, rather than secured lenders, priority to the assets of a bankrupt packer. That decision, Mahon v. Stowers, 416 U.S. 100 (1974), reasoned that the Packers and Stockyards Act of 1921 did not create a trust in favor of unpaid producers, 416 U.S. at 113. One year later, American Beef Packers, Inc. (hereinafter ABP), failed, owing producers in 13 states a total of $20,000,000. Their efforts to collect from ABP's assets were defeated by a lien on the bankrupt's inventory held by its principal lender.

In response, Congress amended the Packers and Stockyards Act. See Senate Rept. No. 94-932, 94th Cong., 2d Sess.,

reprinted in [1976] U.S. Code Cong. & Admin. News 2267. The changes were designed to safeguard producers against such losses in the future. Section 206 gives unpaid cattle sellers a trust on the livestock, inventory, accounts receivable and meat product proceeds of a packer which defaults. The statute also gives producer-sellers precedence over liens held by lenders. Indeed, Congress explicitly declared (7 U.S.C. §196(a)) that lenders' encumbrances on packers' inventory, accounts receivable and related assets are "an obstruction to commerce" and "contrary to the public interest" to the extent that they deprive sellers of livestock of payment.

The trust provisions apply only to packers whose average annual purchases exceed $500,000 and only protect "cash-basis" livestock sellers, 7 U.S.C.

§196(b). The statute defines the latter term broadly, however, in order to further the remedial purpose of the legislation.

Because of the nature of livestock transactions and custom in the industry, funds usually are not transferred as soon as the livestock leaves the producers' possession.2/ The statute, however, declares that all sales are deemed to be for "cash" for purposes of the trust, unless the seller expressly

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2/ Livestock often must be moved a long distance by common carrier to the packer. In addition, sales are sometimes based on the "dressed weight;" these transactions are called "grade and yield" sales. Live weight sales, unless conducted at a stockyard, generally require weighing at the packer's plant upon arrival at the plant, thereby precluding payment at the producer's farm. As regards "grade and yield" sales, the dressed weight cannot be determined until the livestock is slaughtered.

agrees to extend credit to the packer. 7 U.S.C. §196(c).[3/]

The trust created by the statute and regulations necessarily increases the risk to lenders and others who must compete with the producer for payment. The risk is tempered, however, by 7

3/ The protection was carried further by 7 U.S.C. §228b. This provision codified an existing U.S. Department of Agriculture rule that an agreement for the purchase of cattle on credit must be in writing. See 9 C.F.R. §201.43, issued at 29 Fed. Reg. 1795 (February 6, 1964). See also 9 C.F.R. §201.200. As a result all sales are considered to be for cash and the purchaser is obligated to make payment on the business day immediately following delivery of the livestock, unless the packer and the producer execute an express written credit agreement. A similar regulation states that a producer will lose the protection of the trust only if he executes a written document expressly waiving his rights to the protection given him under the statute. (9 C.F.R. §201.200).

U.S.C. §196(b), which says that a producer who sells on a cash basis must serve notice on the packer within 30 days of the date payment is due (or within 15 days after notice of a dishonored payment instrument) if he is not paid and wishes the protection of the statute. He also must file a copy of the notice with the Secretary of Agriculture.

(b) The events of this case

The bank's claim arose from a $450,000 line of credit it granted to Gotham. As part of that arrangement, the bank was to collect Gotham's accounts receivable and transfer funds to Gotham's operating account.

The loan balance remained at approximately $450,000 from the Spring of 1978 until early 1979. Late in

February of the latter year, however, the bank began to apply Gotham's accounts receivable against the loan balance, without advancing any replacement funds to Gotham's operating account. Between February 28 and March 19, 1979 the bank applied more than $300,000 of Gotham's receivables. This reduced the amount owed to it from $450,000 to $112,324. (T.R. 1-63).[4/] Gotham did fail; and the livestock producers were not paid. When the bankruptcy petition was filed on March 9, 1979 Gotham had completely depleted its inventory of meat products (T.R. 1-99).

4/ "T.R." refers to the transcript of the trial proceedings held before the Bankruptcy Court.

The bank's basic contention below was that Gotham often failed to pay promptly. From that premise, it argued that the Respondents should be considered "credit" sellers, not cash sellers, and, therefore, that they were not entitled to the protection which 7 U.S.C. §196 gives to cattle producers. The Bankruptcy Court rejected that contention.

Bankruptcy Judge Sidney M. Weaver noted that the statute says the trust can be waived only by an express credit agreement. After reviewing the documents and the testimony of one of the bankrupt's principal officers and indicating that he did not find it credible on this issue, he found that "the course of conduct of these livestock sellers did not amount to an extension of credit, let alone an express extension of credit."

SUMMARY OF ARGUMENT

Each of the lower courts has pointed out that the bank's argument would negate both the plain language of the statutory trust provisions and the legislative intention.

The purpose of the 1976 amendments of the Packers and Stockyards Act was to protect cattle producers. The basic technique was to make it clear that a bank which made loans to a packer bore the risk of default unless the rancher or other producer "expressly" agreed - in writing - to extend credit to the packer. This rule means that each side knows where it stands. In contrast, if the question of "credit" or "cash" sale were to be debated in the light of "late payments" or other circumstances of each case, the situation would be highly

uncertain. Further, the statute's basic purpose - protecting cattle producers whom Congress considered to be important to the national well being - would be jeopardized.

The Petitioner makes only passing reference to the statutory language and the legislative history. It contends, instead, that the interpretation accepted by the courts below would have undesirable economic consequences and, accordingly, that it cannot reflect the Congressional intention. This is only lawyers' argument - no evidence supports it. In contrast, the opinions of the three courts below set forth extensive extracts from the legislative history as well as a compelling analysis of the statutory language. These show that Congress realized that the amendments had to increase the risk to lenders

somewhat if cattle producers were to be given additional protection. Thus the petition has no merit.

Moreover if, arguendo, there could be some reason for this Court to review the statute in question, this petition is not the appropriate occasion.

This case presents no conflict. If there is a "federal question" it is one as to which there presently is unanimity among the courts. Indeed, only one Court of Appeals has even considered the matter. Much of the petition discusses a hypothetical "worst case" rather than the actual "case or controversy" which is essential to jurisdiction.

The facts, for present purposes, are the findings of the Bankruptcy Court. Those findings are not reconcilable with the bank's theories; and the District Court and the Court of

Appeals each have found that they are not clearly erroneous.

The Petitioner's economic arguments, moreover, are speculation, unsupported by the record. It offered no expert testimony at trial. Thus any evil economic consequences of the statute - the heart of the bank's argument - have not yet been documented. Even more important, if the Petitioner's contentions had a solid foundation in fact, they still would remain economic rather than legal arguments. Such claims might be suitable to a political campaign to have Congress amend the statute. But they are not appropriate to a petition for certiorari.

ARGUMENT

I. THE DECISIONS BELOW ARE FAIR AND AN ACCURATE INTERPRETATION OF THE STATUTORY TEXT AND LEGISLATIVE HISTORY

As the petition itself points out (P. 13), Congress realized that there is no way to eliminate all loss when a large meat packing company goes bankrupt. The statute is an effort to distribute that inevitable loss in a manner Congress thought to be reasonably fair and in the national interest, taking into account the relative positions of the banks and the producers.

The few portions of the legislative history which the Petitioner cites are wholly inconclusive. Their weakness is particularly apparent in the face of the scholarly analysis of the text and legislative history in the successive

Bankruptcy Court, District Court and Fifth Circuit opinions. Suffice it to say that the draftsmen, responding to the distress caused by major bankruptcies like that of ABP, clearly made the right of the cattle producers superior to those of secured lenders. They also left room for the exceptional case by the provision that the cattlemen would not have that protection if they expressly agreed to sell their cattle on "credit".

Both the dictionary meaning of "express" and the construction which federal courts have given that term in other statutes support the simple idea that an implied agreement is not an express agreement.[5/] Further, the

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5/ See Richardson v. United States, 190 F.Supp. 369, 375 (D.Wyo. 1961):

> Presumably Congress used the word "express" with the

Footnote Continued

Petitioner's argument would mean, in practice, that any packer which delayed paying its bills could deprive the producers of their rights. Unless the seller (usually a much smaller business if not an individual rancher) were bold enough to cut off his major customer for a few late payments, he would lose the protection of the statutory trust. This would fall far short of the meaningful

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Footnote Continued From Previous Page

> intention that it carry its ordinarily accepted meaning. [citations omitted] It means "directly and distinctly stated", "not merely implied or left to inference". Webster's New International Dictionary of The English Language, 2nd Ed., 1945.

Compare Baltimore & Ohio R.R. v. United States, 261 U.S. 592, 597 (1923) where the court defined an implied agreement as one "inferred, as a fact, from the conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding."

protection which Congress intended when it revised the Packers and Stockyards Act after the ABP disaster.

(a) The bank had notice of the statute and could have taken steps to avoid assuming the risk

The Petitioner's suggestion that the Respondents should be estopped flatly contradicts the findings of fact by the Bankruptcy Judge.

Having considered both documentary evidence and the demeanor of the witnesses, Judge Weaver found that the sellers did not enter into any oral or written contracts to extend credit to the packer. (A. 46).[6/] Further, he found that Gotham had not been unreasonably late in its payments so

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6/ "A." refers to the Appendix to the Petitioner's Brief.

that there was no factual foundation for the argument that continued acceptance of late payments could be either an implied agreement or conduct misleading to the bank. (A. 46).

Indeed, far from finding the basis for an estoppel, the Judge stated that the bank knew Gotham was in financial difficulty (A. 41) when it took steps to reduce the outstanding balance. Thus it did not give up any right because it was deceived by the cattle producers; if anything, the bank took steps which exceeded its rights.

Further, the bank has never explained how the cattle producers "deceived" it by following procedures set forth under the statute.[7/] It merely

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7/ A cattle seller has thirty days to preserve his trust benefits by filing a notice. Thus even if the

Footnote Continued

suggests vaguely that the statute, as interpreted by all of the lower courts, is unfair because it leaves the bank or other lender in a position of unexpected peril.

In reality, this bank, like every other, was far from helpless, and any peril should not have been unexpected.

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bank had satisfied the Bankruptcy Judge that there was a pattern of significantly late payment in this case, that would not mean the sale was for "credit." Logically, the requirement that the packer pay on the next business day is for the protection of the producer, not third parties; and Congress must have contemplated an interval of uncertainty for third-party lenders when it gave the producers thirty days in which to file rather than that unspecified but far shorter period the bank apparently would permit.

The Petitioner's talk of "secret liens" and a "lack of notice" is mere rhetoric. The statute had been on the books since 1976. The bank was charged with notice of its existence. The petition, in fact, says that other banks understood the significance of the legislation[8/] and that some of them decided not to make such loans because the risk seemed excessive. The Petitioner continued to make the loans.

8/ While some institutions opposed the enactment of the trust provisions, the Independent Bankers Association gave the proposals its support. That group argued that "the fiduciary route would enhance packers as a loan customer because this provision would force them to keep more accurate records of such things as what is owed, inventory, and accounts receivable." Report of Business Meetings on H.R. 8410, House Committee on Agriculture, H.R. No. 94-1043 (April 14, 1976), 94th Cong., 2d Sess. at 65.

Nothing in the record suggested the producers had anything to do with that decision; or that it was anything other than a business judgment by one bank - but not others - that the potential profits of the loans seemed high enough to justify the risk.

Equally significant, the Petitioner could have taken a variety of steps to reduce the risks it assumed at that point. Unlike the cattle producers, the bank had the resources and ability to review Gotham's financial records and analyze Gotham's short term and long term financial prospects. This meant it could assess, regularly, the wisdom of continuing to make loans in view of the ratio of Gotham's assets to its debts and, more particularly, the amounts which might be owed to cash basis livestock sellers.

Moreover the bank had an express arrangement with Gotham. Under that contract it could have demanded that Gotham provide collateral above and beyond its inventory, accounts receivable and sales proceeds.

(b) The Petitioner's estoppel argument would require the Court to reexamine questions of fact which already have been subjected to three levels of judicial scrutiny and, also, to set aside specific fact findings by the Bankruptcy Judge

We suggest that the evidence shows that a business risk went bad and a professional lender suffered a loss - nothing more. But the question at this late stage is not whether the Court agrees with the suggestions of the Petitioner or the Respondents as to the manner in which a prudent bank would have behaved. The mere existence of

that fact dispute makes this case unsuitable for a third level of review.

The Supreme Court repeatedly has said that it is a "court of law" rather than a "court for the correction of errors" and, consequently, that it cannot review findings of fact which have been upheld by two courts, absent obvious and exceptional error. Graver Tank & Manufacturing Co. v. Linde Air Products Co., 336 U.S. 271, 275 (1948); Berenyi v. Immigration & Naturalization Service, 385 U.S. 630, 635 (1967). Each of the Petitioner's legal contentions depends on factual premises which cannot be reconciled with Judge Weaver's findings. Further, both the District Court and the Court of Appeals have rejected the arguments of the Petitioner that those findings were "clearly erroneous".

II. THIS CASE IS NOT APPROPRIATE FOR CERTIORARI

(a) The petition does not point to any conflict

The petition points to no conflict among the circuits and to no conflict between the decisions of the Fifth Circuit and the United States Supreme Court. Nor does it mention any other conflict. In fact, those District and Bankruptcy Court opinions which have considered Section 196 are entirely consistent with the Fifth Circuit's interpretation. See Fillippo v. S. Bonaccurso & Sons, Inc., 466 F.Supp. 1008 (E.D.Pa. 1978); Hedrick v. S. Bonaccurso & Sons, Inc., 466 F.Supp. 1025 (E.D.Pa. 1978); In re Federal Packing Co., No. 78-1492-BK-CA-B (S.D.Fla., April 23, 1979); In re Frosty Morn Meats, Inc., No. BK 77-31707 (M.D.Tenn., Aug. 31, 1978).

The Petitioner itself emphasizes that this is the first appellate opinion to deal with the amendments of the Packers and Stockyards Act. The bank, however, does not point to any urgency which might justify its demand that the Court grant certiorari in the first such case to reach the circuit level.

For our part, we urge that if the Court is concerned with the economic implications of the amendments, it would be undesirable to grant certiorari before other circuits have had an opportunity to consider the problem. See White Motor Co. v. United States, 372 U.S. 253 (1963), where the Court declined to make a significant antitrust ruling because it lacked information as to the economic and social consequences of the business practices in question.

(b) Many of the "facts" essential to the bank's argument are hypothetical at best

The petition discusses a scenario in which a rancher agrees to sign a credit agreement and throws it away, while engaging in dialogue with a representative of the Department of Agriculture. (p. 12). To be fair, the petition makes it clear that these "facts" did not happen and that they were conjured up for the sake of argument. Yet the principle is well established that the United States Supreme Court will not issue an advisory opinion on a hypothetical. Muskrat v. United States, 219 U.S. 346 (1911); United Public Workers v. Mitchell, 330 U.S. 75 (1947).

The Petitioners' final argument (p. 18) that the telephone company and every other business also would be "liable" has even less relationship to this case. The statutes in question deal with the relationship between creditors of a packer and cattle producers, nothing more.

(c) Congress has dealt with the area recently and may do so again

An article the Petitioner itself cites, Burke, U.C.C Annual Survey, 32 Business Lawyer 1133, 1154 (1977), states that Congress and a number of state legislatures were displeased with the conclusion which a commercial law analysis led to in Mahon v. Stowers, supra, and that they amended federal and state legislation in 1975 and 1976 to give greater protection to the producer.

This history suggests that if the Court were to take the time to examine the economics of the cattle business once more, it would have to do so in the realization that those efforts might well be nullified once more, or rendered moot, by impending legislative action.9/

(d) Congress is the appropriate forum for the Petitioner's argument that the statute will have undesirable economic consequences

Unhappy at the result of the case, the Petitioner predicts that the precedent will lead banks to stop making loans to packers and this in turn will lead to monopoly and chaos in the cattle business.

9/ The Petitioner mentions that a number of bills now are pending before the House and Senate which deal with aspects of the conflict between lenders and the producers of agricultural commodities. (p. 8). The Court's efforts might well be wasted.

Yet the bank did not provide the Bankruptcy Court with any expert testimony to support such a prediction. Even at this stage, the only material it cites to support the grim prognosis is a brief extract from the Business Lawyer. That article appeared in 1977. This is 1982. Where is the monopoly? Why has the bank no evidence of actual chaos in the markets?

Had the marketplace actually collapsed or were such a peril serious, it seems likely that other banks and lenders would have sought to support the Petitioner's warnings. Yet the only amicus is the Department of Agriculture. The Department, an interested third party, supports the position of the Respondents.

More important, if the predictions of the Petitioner's counsel concerning the economic consequences of the Act were plausible and supported by expert testimony and statistical data, they still would be in the wrong forum. It is the responsiblity of Congress, not the Supreme Court, to make economic judgments.

The Petitioner misses the point when it says (p. 13) that the bank is not guilty of a breach of trust and that lending institutions have a valid social function. No one questions either proposition. But the producers also have a valid function.

As the Petitioner says (p. 8), there is a natural conflict between the needs of ranchers, farmers and others who raise cattle and those banks which

are in the business of making loans to packers. Faced with a difficult policy choice, Congress passed several statutes which changed the balance somewhat, in favor of the producers. The legislative history shows that the draftsmen did so because they concluded that producers need more protection than do banks and that their role in agriculture makes it part of the national interest to shield them to a greater extent.

This case does not offer the Court either an opportunity or a reason to challenge that legislative judgment.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: August 3, 1982

CERTIFICATE OF SERVICE

I HEREBY CERTIFY on this 3rd day of August, 1982, three copies of the Respondents Lykes Brothers, Inc., United States Sugar Corporation and D. R. Kilpatrick Brief in Opposition to Petition for Writ of Certiorari were mailed, postage prepaid, to Robert J. Paterno, Esq., Taylor, Brion, Buker & Greene, 1451 Brickell Avenue, Miami, Florida 33131; Ernest W. Dean, Jr., Esq., MacFarlane, Ferguson, Allison & Kelly, P.O. Box 1531, Tampa, Florida 33601; Gregory P. Borgognoni, Esq., Shutts & Bowen, 1000 Southeast Bank Building, Miami, Florida 33131; Britton, Cohen, Kaufman & Schantz, 800 Southeast Bank Building, Miami, Florida 33131; Martin L. Sandler, Esq., Broad & Cassel, 1033 City National Bank Building, 25

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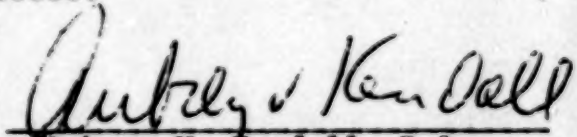
By 
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